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FEDERAL ELECTION COMMISSION

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FIRST GENERAL COUNSEL'S REPORT

2003 MAR 27 P 4: 18

SENSITIVE

MUR: 5338

DATE COMPLAINT FILED: November 21, 2002

DATE OF NOTIFICATION: November 29, 2002

DATES SUPPLEMENTS FILED:¹

November 27 and December 6, 2002;

January 22, 2003

DATE ACTIVATED: December 9, 2002

EXPIRATION OF STATUTE OF LIMITATIONS:

November 6, 2007³

COMPLAINANTS:

Common Cause
through Donald J. Simon, Acting President

Democracy 21
through Fred Wertheimer, President

The Campaign and Media Legal Center
through Trevor Potter, General Counsel

¹ The first two supplements consisted of the exhibits to the complaint, which had apparently been inadvertently left off of the complaint. For ease of reference, the material in these supplements will be cited in this report simply as exhibits to the complaint, not as supplements. The third supplement, which will be cited as "MUR 5338, Supplement to the Complaint, January 22, 2003," contained additional substantive argument based on facts that occurred after the complaint was filed.

³ All of the potential alleged violations are of provisions added to the law by the Bipartisan Campaign Reform Act ("BCRA"). Accordingly, this Office has determined to reflect in the Case Management and Enforcement Priority Systems a statute of limitations date five years after the effective date of BCRA, which is five years after any violation could even theoretically have occurred in this matter. As described *infra* in the main text, it now appears one respondent may have actually violated the law as early as December 24, 2002; the statute of limitations would run on that violation on December 24, 2007.

Center for Responsive Politics
through Larry Noble, Executive Director

RESPONDENTS:

The Leadership Forum
Susan Hirschmann
L. William Paxon
National Republican Congressional Committee
and Donna M. Anderson, as treasurer
Democratic State Parties Organization
Joseph Carmichael
DNC Services Corp./Democratic National
Committee
and Andrew Tobias, as treasurer
Terry McAuliffe

RELEVANT STATUTES:

2 U.S.C. § 431(4)
2 U.S.C. § 434(a)(4)(B)
2 U.S.C. § 434(e)(1)
2 U.S.C. § 434(e)(2)
2 U.S.C. § 441a(a)(4)
2 U.S.C. § 441a(a)(5)
2 U.S.C. § 441i(a)(1)
2 U.S.C. § 441i(a)(2)
2 U.S.C. § 441i(b)
2 U.S.C. § 441i(e)
11 C.F.R. § 100.5(g)(4)(ii)
11 C.F.R. § 106.1(c)(1)
11 C.F.R. § 110.3(a)(3)(ii)
11 C.F.R. § 300.2(c)(1)
11 C.F.R. § 300.2(c)(2)
11 C.F.R. § 300.2(c)(3)
11 C.F.R. § 300.12(d)
11 C.F.R. § 300.13(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

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I. INTRODUCTION

The complaint in this matter was the first to allege violations of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (March 27, 2002). This is also the first enforcement matter to apply new Commission regulations implementing BCRA's prohibition on the use of non-Federal funds by national party committees. See 11 C.F.R. §§ 100 *et. seq.* In addition to their substantive provisions, these regulations state that when determining whether an organization is established, maintained or controlled by a national party committee—and thus subject to the prohibition on the use of non-Federal funds—the Commission's findings must be "based on the entities' actions and activities solely after November 6, 2002." 11 C.F.R. § 300.2(c)(3). This Office's recommendations with respect to the Leadership Forum turn on the application of this provision.

The complaint contends that two recently formed organizations, the Leadership Forum ("the Forum") and the Democratic State Parties Organization ("DSPO"), have ties to the Republican and Democratic national committees and thus have violated or are about to violate BCRA's restrictions on the use of non-Federal funds by national party committees. Specifically, the complaint makes the following three allegations against the Forum and DSPO:

- (1) they are directly or indirectly established, financed, maintained or controlled by a national party committee, *see* 2 U.S.C. § 441i(a)(2) and 11 C.F.R. § 300.2(c);⁵
- (2) they have solicited or intend to solicit, receive and spend non-federal funds, *see* 2 U.S.C. § 441i(a)(1); and
- (3) they do not intend to report their financial activity to the Commission, *see* 2 U.S.C. § 434(e).

⁵ With respect to DSPO, the complaint alleges in the alternative that DSPO is directly or indirectly established, financed, maintained or controlled by a state party committee or group of state party committees and that it intends to expend non-Federal funds for Federal election activity in violation of 2 U.S.C. § 441i(b)(1).

As to the Forum, the complaint, responses, and publicly available information do not indicate that it is established, financed, maintained or controlled by the National Republican Congressional Committee ("NRCC"), as the complaint alleges. Because the Forum thus does not appear to be subject to BCRA's prohibition on the use of non-Federal funds by national party committees, this Office recommends that the Commission find no reason to believe with regard to this respondent.⁶ As to the NRCC, this Office does recommend reason to believe that it violated the Act by receiving a refund of non-Federal funds from the Forum after the effective date of BCRA, but due to mitigating circumstances also recommends no further action with respect to this violation.

As to DSPO, the complaint, responses, and publicly available information do indicate that it is established, financed, maintained or controlled by the DNC Services Corp./Democratic National Committee ("DNC"), as the complaint alleges. Specifically, DSPO appears to be virtually identical to, and essentially an alter ego of, an organization called the Association of State Democratic Chairs ("ASDC"), which is a subordinate committee of the DNC. Nonetheless, DSPO appears to have engaged in no activity since its formation, and it represents that no final decisions have been made as to what activity it will engage in or even whether it will become operational. Consequently, because there is no indication that DSPO has violated or is about to violate BCRA's prohibition on the use of non-Federal funds by national party committees, this Office recommends that the Commission find no reason to believe with regard to this respondent or the DNC.

⁶ Significantly, the Forum has engaged in no activity since November 6, 2002 other than submitting a putative advisory opinion request to the Commission, defending itself against the complaint in this matter, and returning to the NRCC \$1 million that it received prior to November 6. The receipt and return of the \$1 million appear to be the only financial activity in which the Forum has ever engaged.

H. APPLICABLE LAW

The Federal Election Campaign Act of 1971, as amended ("the Act"), provides that effective November 6, 2002, national committees of political parties – including national congressional campaign committees – may not solicit, receive, or direct to another person a contribution, donation or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. § 441i(a)(1). This prohibition also applies to officers and agents acting on their behalf, and to any other entity directly or indirectly established, financed, maintained or controlled by a national party committee. 2 U.S.C. § 441i(a)(2).

An entity that directly or indirectly establishes, finances, maintains or controls another entity is a "sponsor" of the other entity. 11 C.F.R. § 300.2(c)(1). The Commission must examine a variety of factors, set forth in 11 C.F.R. § 300.2(c)(2)(i) through (x), "in the context of the overall relationship between the sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains or controls the entity." 11 C.F.R. § 300.2(c)(2). Moreover, the list of ten factors is not exclusive. *Id.* Although there are some changes in terminology to reflect the new context presented by enactment of 2 U.S.C. § 441i, the factors are essentially the same as the affiliation factors listed at 11 C.F.R. § 100.5(g)(4)(ii) and 11 C.F.R. § 110.3(a)(3)(ii). *See Explanation and Justification for Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money ("E&J")*, 67 Fed. Reg. 49064, 49084 (July 29, 2002). These factors have been used since 1989 (and some of them since far earlier) to determine whether two committees not deemed to be affiliated *per se* are nevertheless affiliated (and therefore subject to single limits on contributions made to or received from a single source) pursuant to 2 U.S.C. § 441a(a)(5).

Further, an entity generally cannot be determined to be directly or indirectly established, maintained or controlled by a sponsor unless that determination is "based on the entities' actions and activities solely after November 6, 2002." 11 C.F.R. § 300.2(c)(3). With respect to financing, the same safe harbor rule provides that "if an entity receives funds from another entity prior to November 6, 2002, and the recipient entity disposes of the funds prior to November 6, 2002, the receipt of such funds prior to November 6, 2002 shall have no bearing on determining whether the recipient entity is financed by the sponsoring entity within the meaning of this section." *Id.* By contrast, if one entity received funds from another entity prior to November 6, 2002, and the recipient entity did not dispose of the funds until *after* November 6, 2002, the recipient's retention of the funds is "relevant to" any determination as to whether the donor "financed" the recipient within the meaning of 2 U.S.C. § 441i. E&J at 49084.

Also effective November 6, 2002, national party committees, national congressional campaign committees, and any "subordinate committees" of either shall report all receipts and disbursements on a monthly basis. 2 U.S.C. §§ 434(a)(4)(B) and (e)(1); 11 C.F.R. § 300.13(a). The term "subordinate committee" also appears in 2 U.S.C. § 441a(a)(4), the longstanding provision of the Act that exempts transfers of otherwise permissible funds between committees of the same political party from the contribution limitations of 2 U.S.C. § 441a(a)(1) and (2). However, the term is not defined anywhere in the Act or the Commission's regulations. In the E&J for 11 C.F.R. § 300.13(a), the Commission, drawing on Advisory Opinion 1976-112 (Democrats Abroad), concluded that "a 'subordinate committee' of a national party committee is one that is affiliated with, and participates in, the official party structure of the national party committee." The Commission further stated that, "[b]ased on the broad legislative intent to prohibit national parties from raising and spending non-Federal funds . . . that a subordinate

committee . . . is an entity that is directly or indirectly established, financed, maintained or controlled by a national committee of a political party." E&J at 49092-93. This means that all subordinate committees of a national party committee are by definition "established, financed, maintained or controlled" by the national committee.

III. THE LEADERSHIP FORUM AND THE NRCC

A. Facts

1. Organization and Personnel of The Leadership Forum, Inc.

On October 28, 2002, the Forum registered with the Internal Revenue Service as a political organization within the meaning of 26 U.S.C. § 527. http://eforms.irs.gov/pac_list.asp?irs_pac_key=810576274. It has not registered with the Commission as a political committee and apparently does not intend to. See MUR 5338, Leadership Forum Supplemental Response at 5 (asserting that the Forum exists "outside of the reach of the FECA"); see also Attachment 1 at 1 (putative advisory opinion request from the Forum stating that it "intends in the very near future to engage in activities currently prohibited to any entity that could be deemed to be established, financed, maintained or controlled by the NRCC").

On November 5, 2002, the Forum incorporated as a Virginia non-stock corporation. MUR 5338, Leadership Forum Response⁷ at Exhibit 1 (articles of incorporation). It is unclear whether the Forum has adopted bylaws. On its initial filing with the IRS, the Forum stated that its purpose was "to engage in nonfederal political activities on state and local levels and to engage in dialogue on issues of importance to all Americans." IRS Form 8871. Its articles of incorporation describe its purpose similarly. MUR 5338, Leadership Forum Response at Exhibit

⁷ The same counsel represents the Forum and respondents Paxon and Hirschmann. Although three separate responses were filed, they are essentially identical with the exception of additional argument in the Paxon and Hirschmann responses concerning the alleged personal liability.

2. Clause 2 of the Forum's articles of incorporation provides in pertinent part that "[t]he corporation shall not permit any employee of a Federal candidate or state, district or local committee of any political party to directly or indirectly establish, maintain, finance or control the corporation" and that "[t]he corporation shall not permit any employee of a Federal candidate or state, district or local committee of any political party to be employed by, or provide services to, the corporation." *Id.*

The Forum's initial IRS filing listed as its president Susan B. Hirschmann,⁸ a non-lawyer partner at the firm of Williams & Jensen in Washington, D.C., where she provides the firm's clients with "strategic advice concerning the House and Senate Leadership and the administration, as well as grassroots organizations." http://www.williamsandjensen.com/pages/attorney_pages/SusanHirschmann.html. According to an article in *Roll Call* that is cited in the complaint, Hirschmann left a position as chief of staff to then-House Majority Whip (now Majority Leader) Tom Delay in August 2002. John Bresnahan, *NRCC Quietly Gives \$1 million to New 527*, *Roll Call*, Nov. 7, 2002 (available on Westlaw at 2002 WL 8127230).

The Forum's vice president, L. William Paxon, is a non-lawyer "senior adviser" to the Washington office of Akin Gump Strauss Hauer & Feld. A former member of the House of Representatives, he was chairman of the NRCC from 1992 to 1996. He resigned from the House of Representatives in 1998, but apparently retains extremely close ties to the entire Republican leadership of the House of Representatives. *The New Republic*, <http://www.tnr.com/archive/1199/110199/coverstory110199.html>. The Akin, Gump web site also states that "since leaving Congress, Mr. Paxon has remained active in national Republican politics, and serves as an

⁸ Both materials filed by respondents and public accounts variously spell the Forum's president's last name as "Hirschman" and "Hirschmann." This report will refer to her as "Hirschmann."

adviser to senior GOP congressional leaders." <http://www.akingump.com/>

[attorney.cfm?attorney_id=1128](http://www.akingump.com/attorney.cfm?attorney_id=1128).

Named as the Forum's secretary-treasurer in its initial IRS filing is Julie Wadler. Wadler was deputy finance director of the NRCC when Paxon was its chair. She is now president of a firm known as Epiphany Productions, which is evidently a fundraising and event management firm located in Alexandria, Virginia. <http://www.epiphanyproductions.com/who.html>. Among the organizations Epiphany lists as "past [or] present" clients on its web site are the NRCC, the Republican National Committee ("RNC"), and "Speaker Denny Hastert's Keep Our Majority PAC." <http://www.epiphanyproductions.com/clients.html>. The Forum's response, which is dated January 10, 2003, asserts that Wadler is "no longer an officer of, [sic] the Forum and has never been an employee of the Forum." MUR 5338, Leadership Forum Response at 10.

However, the Forum's Form 8872 for the Year-End reporting period, filed with the IRS on January 27, 2003, continues to name Wadler as the custodian of the Forum's records.⁹

Also named on the articles of incorporation as the Forum's incorporator and its initial registered agent is Elizabeth N. Beacham, a staff attorney at Akin Gump. In the not quite three years since graduating from law school, she has apparently also been employed as deputy redistricting counsel for the Republican National Committee and deputy counsel for the NRCC. http://www.akingump.com/attorney.cfm?attorney_id=1988. The address reported by the Forum to the IRS is apparently Beacham's residence.¹⁰

⁹ The Forum's Post-General Form 8872, filed in December with the IRS, also listed Wadler as custodian of records, though its Form 8871, filed on October 28, 2002, did not.

¹⁰ The Forum's notification of the complaint, addressed to "Susan Hirschmann, President, The Leadership Forum" at that address, was returned marked "Return to Sender - Attempted - Not Known - Unable to Forward." Notification was not accomplished until the Forum's counsel contacted this Office to state that he knew of the complaint from a press release issued by the complaining organizations, but that his client had not received the complaint.

A fifth individual associated with the Forum is its lead counsel in this matter, J. Randolph Evans of Arnall Golden Gregory in Atlanta, Georgia ("Counsel"). The Forum's original registration to the IRS named Evans as custodian of its records. Evans represents "the former and current Speaker of the United States House of Representatives, Newt Gingrich and Dennis Hastert, respectively." http://www.agg.com/Attorneys/evans_randolph.html. As described further below, Evans also issued an opinion letter to the NRCC regarding the legality of a \$1 million donation to the Forum.

2. Early Media Accounts About The Forum

Attached as exhibits to the complaint are a number of media accounts that either mention the Forum directly or appear to allude to it indirectly. Perhaps the most significant of these is an article by Alexander Bolton in *The Hill* newspaper entitled "Both parties race to set up new soft-money mechanisms." The article, which appeared five days before the Forum first registered with the IRS, quotes Representative Tom Davis, then chairman of the NRCC: "We want to make sure there are adequate conduits for our supporters to get our message out, so we can compete with what they're doing on the other side . . . *We're having stuff set up right now* [emphasis added]. We're making sure there are appropriate routes so that issue advocacy continues." MUR 5338, Complaint, Exhibit G. The article also paraphrases Davis as saying that the entire House GOP leadership is involved in the effort. *Id.*

The article also describes Hirschmann as "spearhead[ing] a unified effort to legally raise soft money to help Republican candidates" and paraphrases her as saying that House Republicans had not settled on the type of group they would use to get their messages out to voters. *Id.* The article goes on to quote Hirschmann: "I'll continue to raise a lot of money to get that message out . . . I don't know if the mechanisms of how to do that have been determined yet.

I don't think any final decisions have been made." *Id.* The Forum's response to the complaint states that several of the comments in the article are "at best, uninformed conjecture, and more commonly, false allegations," though it does not specify which comments fit this description. MUR 5338, Leadership Forum Response at 4.

3. The \$1 Million Donation and its Return

As disclosed in both the NRCC's Post-General report to the Commission and the Forum's Post-General report to the IRS, the NRCC building fund sent \$1 million to the Forum on October 31, 2002, three days after the Forum first registered with the IRS as a political organization. Before making this donation, the NRCC obtained an opinion letter from the same counsel who represented the Forum. In this letter, which is dated October 28, 2002, Counsel advised the NRCC that its donation to the Forum "will not subject the funds to a use inconsistent with the restrictions against use for the purpose of influencing any particular election for Federal office which existed at the NRCC at the time the contributions were originally made."¹¹ MUR 5338, Leadership Forum Response, Exhibit 3 at 4.

On November 21, 2002, the Forum requested an advisory opinion to determine whether its acceptance of the \$1 million would deem it to be "directly or indirectly established, financed, maintained or controlled" by the NRCC.¹² Attachment 1 at 2, 7. In the alternative, the request sought "guidance as to how it can divest itself of the funds . . . so as not to be deemed to be established, maintained, financed or controlled by the NRCC." *Id.* at 7. The Forum stated that it solicited the donation from the NRCC under a number of express conditions, among which was that "the funds were to be designated solely for The Leadership Forum's Building Fund." *Id.* at

¹¹ This letter did not address 2 U.S.C. § 441i(a), which at the time was nine days before becoming effective.

¹² The Commission received the request 44 minutes before it received the complaint in this matter.

5. Finally, the Forum declared that the \$1 million had been maintained in a segregated account.

Id. at 6. Upon receiving the Forum's request, this Office asked it to provide additional information necessary to form a "complete written request" within the meaning of 11 C.F.R. § 112.1(c).

The Forum originally indicated that a response to this Office's request would be forthcoming. MUR 5338, Memorandum to the Commission, December 20, 2002, at 2 n.2. No such response was received, however, as the Forum apparently determined to send the money back to the NRCC. In a December 31 letter to the NRCC, the Forum stated that it declined to accept the previously transferred funds, which it claimed were deposited into a separate segregated account and had not been used for any purpose.¹³ MUR 5338, Leadership Forum Response, Exhibit 4 at 1-2. The letter also stated that "by wire transfer, the transferred funds have been returned from the segregated account to the NRCC." *Id.* at 2. The NRCC, however, in its amended 2002 Year End Report, reported the building fund's receipt of the returned \$1 million from the Forum on December 24, a week prior to the letter.¹⁴ See also MUR 5338, NRCC Response at 2. The Forum's Form 8872, filed with the IRS for both the Post-General and Year End periods, disclosed no financial activity other than the receipt and return of the \$1 million.¹⁵

¹³ Notwithstanding the letter's use of the phrase "declines to accept," it appears that the Forum had an unconditional right to use the funds upon depositing them in its own bank account on or about October 31, 2002.

¹⁴ The NRCC's report also discloses that on December 30, it refunded the \$1 million to prior contributors to the building fund.

¹⁵ It should be noted, however, that unlike entities reporting to the Commission, organizations registered with the IRS under 26 U.S.C. § 527 are not obligated to report all of their receipts and disbursements. Instead, they are only required to report itemized operating expenses to any person aggregating more than \$500 in a calendar year, and donations from any person aggregating more than \$200 in a calendar year. See 26 U.S.C. § 527(j).

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B. Legal Analysis

1. Establishment, Financing, Maintenance or Control of the Forum

To determine whether a sponsor directly or indirectly controls an entity, the Commission examines a number of factors in the context of the overall relationship between the sponsor and the entity. See 11 C.F.R. § 300.2(c)(2). Applied to the current situation, these factors include:

- whether the NRCC, directly or through an agent, has the authority or ability to direct or participate in the governance of the Forum through provisions of constitutions, bylaws, contracts or other rules, or through formal or informal practices or procedures, 11 C.F.R. § 300.2(c)(2)(ii);
- whether the NRCC has any members, officers or employees who were members, officers or employees of the Forum that indicates a formal or ongoing relationship between the NRCC and the Forum, or that indicates that the Forum is a successor entity to the NRCC, 11 C.F.R. § 300.2(c)(2)(vi);¹⁶
- whether the NRCC, directly or through an agent, provides funds or goods in a significant amount or on an ongoing basis to the Forum, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 C.F.R. § 102.17, and otherwise lawfully, 11 C.F.R. § 300.2(c)(2)(vii); and
- whether the NRCC, directly or through an agent, had an active or significant role in the formation of the Forum, 11 C.F.R. § 300.2(c)(2)(ix).

¹⁶ Although this factor is phrased in terms of whether the sponsor has any members, officers or employees who were formerly members, officers or employees of the allegedly sponsored entity, the reference to "creation of a successor entity" indicates that a flow of members, officers or employees in the other direction – i.e., from the sponsor to the sponsored entity – is also highly relevant to the determination.

We address first the evidence of NRCC's role in the establishment of the Forum; second, the impact of the \$1 million donation and its return; and finally, the nature of the relationships between persons associated with the Forum, the NRCC, and the House Republican leadership.¹⁷

a. NRCC's Role in the Establishment of the Forum

A number of facts would ordinarily raise questions as to whether the NRCC played a substantial role in establishing the Forum. First, in comments printed five days prior to the Forum's first IRS filing, *The Hill* quoted Rep. Davis as saying that "[W]e're having stuff set up right now . . . so that issue advocacy continues." The article went on to paraphrase Davis as saying that, in the article's words, "the entire House GOP leadership is involved in the effort." The article also connected Hirschmann to efforts by "House Republicans" to find "mechanisms" to "legally raise soft money." Secondly, it appears that on October 28, the same day the Forum filed its Form 8871 with the IRS naming Counsel as its custodian of records, Counsel provided an opinion letter not to the Forum but to the NRCC. Viewed in light of the connections between the individuals associated with the Forum and the House Republican leadership in general and the NRCC in particular, the comments attributed to Davis and Hirschmann and Counsel's apparent dual representation of the NRCC and the Forum raise a number of questions about the NRCC's role in establishing the Forum.

However, every comment in the article refers to alleged acts that took place, or were taking place, prior to November 6, 2002. More to the point, the comments refer at most to acts undertaken to establish the Forum prior to November 6, 2002. There are no similar facts or

¹⁷ Although this report examines each of the factors in turn for ease of organization, we stress that the ultimate application of the factors at 11 C.F.R. § 300.2(c) must not be mechanistic. Rather, all of the admissible information relevant to the factors "must be examined in the context of the overall relationship between the sponsor and the entity" in order to make the ultimate determination as to whether the alleged sponsor in fact has established, financed, maintained or controlled the entity.

alleged comments on the record that occurred after November 6, 2002. The only evident

interaction between NRCC and the Forum after November 6 is the Forum's sending the

\$1 million back to the NRCC on or about December 24, 2002.

Under the safe harbor provision of 11 C.F.R. § 300.2(c), "an entity shall not be deemed to be directly or indirectly established . . . by another entity unless, based on the entities' actions and activities *solely after November 6, 2002*, they satisfy the requirements of this section."

11 C.F.R. § 300.2(c)(3) (emphasis added).¹⁸ The Commission emphasized that "BCRA should not be interpreted in a manner that penalizes people for the way they ordered their affairs before the effective date of BCRA. This will help ensure that BCRA is not enforced in a retroactive manner with respect to activities that were legal when performed." E&J at 49804. Because the acts and comments described in *The Hill* and Counsel's dual (and apparently joint) representation of the Forum and the NRCC date solely to *before* November 6, 2002, they cannot be considered as providing any evidence that the NRCC established the Forum.

b. The \$1 Million

By contrast, the safe harbor provision at 11 C.F.R. § 300.2(c)(3) does not apply with full force to the facts surrounding the \$1 million donation from the NRCC to the Forum because the Forum held on to the money for some time after November 6. See E&J at 49084 (retention by potentially sponsored entity after November 6, 2002 of money received from potential sponsor before November 6 is relevant to a determination of "financing"). While a single donation may not by itself show that the donor "established, financed, maintained or controlled" the recipient within the meaning of 2 U.S.C. § 441i(a), evidence that a potential sponsor provided money to

¹⁸ Unlike the question of "financing," the Commission did not single out the question of "establishment" as "present[ing] special considerations" "within the meaning of this definition." E&J at 49084.

another organization "in a significant amount or on an ongoing basis," such as for administrative costs, may strongly indicate that the potential sponsor "financed" the recipient. See 11 C.F.R. § 300.2(c)(2)(vii). However, in this matter, the Forum returned the money before it did anything else.

Had the money not been returned, the evidence would have pointed strongly to a conclusion that the NRCC "financed" the Forum. The \$1 million payment was direct, and \$1 million is facially a significant amount. Additionally, had it been kept, the \$1 million would have been the Forum's seed money, in that it was the first money the Forum received and, until it was returned, apparently the *only* money the Forum received. But the Forum did not keep the money, and further did not make any disbursements during the short period it had the funds. Under these circumstances, the importance of the NRCC's donation is significantly diminished.

According to the putative AOR, the Forum conditioned its solicitation of the NRCC donation on, among other things, a representation to the NRCC "that the funds were to be designated solely for The Leadership Forum's Building Fund." Because the Act has never provided for any special treatment for a "building fund" of any entity not a party committee,¹⁹ the bricks-and-mortar-type expenses not attributable to any particular candidate that are implied by the term "building fund" would, in the Forum's case, be classic administrative expenses. Cf. 11 C.F.R. § 106.1(c)(1). Thus, not only did the payment come directly from the NRCC in a significant amount, but the NRCC knew that it would be for administrative costs. In addition, the November 7, 2002 *Roll Call* article cited unnamed "GOP sources" as indicating the Forum "may be taking over some administrative functions currently done by the NRCC." Bresnahan,

¹⁹ BCRA repealed the former 2 U.S.C. § 431(8)(B)(viii), which exempted from the definition of "contribution" any donation to a party committee's building fund, but added new 2 U.S.C. § 453(b), which essentially continues the ability of state and local party committees to receive and spend wholly non-Federal funds for office buildings so long as the funds are in complete compliance with applicable state law.

supra. Were all other things equal, these facts would weigh strongly on the "financed by a sponsor" side of the balance, in accordance with 11 C.F.R. § 300.2(c)(1)(vii).

However, all other things are not equal, because the Forum apparently engaged in no other financial activity prior to the return of the funds on December 24. Had any of the NRCC's \$1 million been spent; had it been pledged as collateral for a loan; or even had the Forum raised other funds prior to December 24, the \$1 million would have, to at least some degree, retained its character as "seed money." But at least so far as is apparent from the Forum's Forms 8872, none of this happened. It is true the money was available to the Forum from October 31 to December 24, and the return of the money by no means negates that fact. But under the circumstances, the mere fact of the money's availability is far less important than it might otherwise have been.²⁰

In a supplement to the complaint, the complainants argue that the return of the money should make no difference to the Commission's analysis. They argue that because the Forum was established, financed, maintained or controlled by the NRCC, the Forum was prohibited from possessing any non-Federal funds from November 6, 2002, and that its return of the money after that date does not vitiate its illegal possession of the funds. MUR 5338, Supplement to the Complaint, January 22, 2003, at 2. They also argue that "once affiliated, the Forum's return of the funds it received from the NRCC cannot serve to dis-affiliate it." *Id.*

Contrary to the complainants' arguments, the initial question is not whether the Forum's possession of the \$1 million violates the prohibition on the use of non-Federal funds by national

²⁰ Also relevant is the Forum's self-imposed restriction on any use of the money, which was implied by the Forum's November 21 putative AOR, which sought, in the alternative, "guidance as to how it can divest itself of the funds . . . so as not to be deemed to be established, financed, maintained or controlled by the NRCC." Attachment 1 at 7. This request, of course, was received only 15 days after the effective date of the relevant provision of the Act. These facts and those noted in the main text are all part of the totality of the circumstances relevant to any determination under 11 C.F.R. § 300.2(c). The availability of unspent funds provided by an alleged sponsor under different circumstances and at times other than the first few weeks after BCRA's effective date may lead to different conclusions.

party committees. See 2 U.S.C. § 441(i). Rather, the first question must be whether the possession of the \$1 million caused the Forum to be "directly or indirectly established, financed, maintained, or controlled" by the NRCC and thus subject to the prohibition at all. Second, in determining whether the NRCC was a sponsor of the Forum, the Commission must consider "the context of the overall relationship" between the Forum and the NRCC, see 11 C.F.R. § 300.2(c)(2), and at this time that context includes the return of the money. Viewed in this context, the transfer and return of the \$1 million during the BCRA transition period while the Forum engaged in no other financial activity does not by itself establish the Forum was "financed" by the NRCC for purposes of 2 U.S.C. § 441(i).

c. Relationships Between Persons Associated With the Forum, the NRCC, and the House Republican Leadership

This leaves consideration of the relationships between the individuals associated with the Forum, on the one hand, and the NRCC and the House Republican leadership, on the other.²¹ These relationships are not insubstantial. Of the five individuals who appear to be most closely associated with the Forum, one is a former chairman of the NRCC; two are former NRCC staff members, one of whom – albeit the one respondents claim is no longer an officer of the Forum – is president of a company that includes the NRCC on its web site's list of "past [or] present"

²¹ The question of relationships with members of the House Republican leadership is important because candidates for Federal office or persons holding Federal office are, like national party committees, subject to an effective prohibition on the raising or spending of any funds not within the limitations and prohibitions of the Act. 2 U.S.C. § 441i(e); see E&J at 49107 (new 11 C.F.R. § 300.62, which implements 2 U.S.C. § 441i(e), "permits Federal candidates and officeholders to solicit, receive, direct, transfer, spend, or disburse funds in connection with Federal and non-Federal elections only from sources permitted under the Act and only when the combined amounts solicited and received from any particular person or entity do not exceed the amounts permitted under the Act's contribution limits"). As with national party committees, this prohibition extends to entities directly or indirectly established, financed, maintained or controlled by one or more Federal candidates or Federal officeholders. 2 U.S.C. § 441i(e)(1). Thus, even if one concluded that the Forum was not established, financed, maintained or controlled by the NRCC as a national political committee, a determination that it was established, financed, maintained or controlled by the House Republican leadership (or members thereof) as a group of Federal officeholders would still subject the Forum to a bar on raising or spending non-Federal funds.

clients, and one appears to have provided legal representation to both the Forum and the NRCC in connection with the operative facts of this matter. Moreover, of the same individuals, one is a former member of the Republican leadership; one left a position only last August as chief of staff to the then-Majority Whip, who is now the Majority Leader; both of these individuals' law firms actively promote their continuing close relations with the leadership; and a third individual is promoted by his law firm as representing Speaker Hastert.

The prior association of individuals at the Forum with both the NRCC and the House Republican leadership is one factor that may determine whether the NRCC established, financed, maintained or controlled the Forum, provided that the association "indicates a formal or ongoing relationship" between the Forum and either the NRCC or the House leadership. 11 C.F.R. § 300.2(c)(2)(vi). Likewise, if the NRCC or the House leadership have the "authority to direct or participate in the governance of" the Forum through "formal or informal practices or procedures," then that also may indicate establishment, maintenance or control of the Forum by the NRCC or House leadership. 11 C.F.R. § 300.2(c)(2)(ii).

There does not appear to be any evidence that either NRCC or the House Republican leadership has formal authority to direct or participate in the Forum's governance. The Forum's Articles of Incorporation give no such formal authority to the NRCC or to the House Republican leadership, either individually or collectively.²² Likewise, nothing in the nature of the relationships between the individuals associated with the Forum and members of the NRCC or the House Republican leadership demonstrates a formal relationship between the Forum, as an

²² However, contrary to the representations in the Forum's response, they do not absolutely prohibit such involvement. Clause 2 of the articles prohibits employees of state or local party committees or Federal candidates or officeholders from establishing, maintaining, financing or controlling the Forum; being employed by the Forum; or providing any services to the Forum. Notably, it covers only employees, and not the state or local party committees, Federal candidates, or Federal officeholders themselves. Moreover, it says nothing about national party committees or their employees. MUR 5338, Leadership Forum Response, Exhibit 1 at 1.

entity, and the NRCC or the House Republican leadership. Therefore, the question is reduced to whether the apparently ongoing informal relationships between the individuals associated with the Forum and individuals associated with the NRCC or the leadership are by themselves sufficient to support a conclusion that there may be an ongoing relationship between the Forum itself and its potential sponsors or that the sponsors can control the Forum's governance through "informal practices or procedures."

In this Office's opinion, something more than the mere fact of such informal, ongoing relationships between the personnel of a potentially sponsoring and potentially sponsored entity is necessary to support a conclusion of "establishment, financing, maintenance or control."²³ Moreover, while former employers and colleagues may exercise influence, influence is not necessarily control. In any given instance, these relationships may fall somewhere along a spectrum. At one end of the spectrum is a complete "firewall" of no contacts whatsoever. Further along the spectrum are contacts or communications that do not implicate any provision of the Act. Yet further along the spectrum are contacts or communications by which one group so influences *particular* expenditures or fundraising projects carried out by the other that the expenditures become coordinated within the meaning of 2 U.S.C. § 441a(a)(7) or the fundraising projects implicate Section 441i's particular restrictions on fundraising by party committees or Federal candidates or officeholders. Finally, at the other end of the spectrum, is influence by one group upon the other that is so regular and pervasive that it amounts to control (or at least

²³ In politics, many people change jobs fairly frequently and maintain a network of connections with former employers and colleagues. Many, if not most, persons involved in so-called "527" organizations will have connections similar to those in this case. If the mere existence of such professional ties were sufficient to support a finding of establishment, financing, maintenance or control, then almost every "527" group would be subject to Section 441i, or at least to an investigation to determine whether it was subject to Section 441i.

strongly indicates, when viewed alongside the other affiliation factors, that one group controls the other).

In the present matter, all of the additional evidence that might combine with the evidence of relationships between the Forum's personnel and their former employers and colleagues to support a conclusion of "establishment, financing, maintenance or control" has already been addressed. The evidence of NRCC or leadership involvement in the Forum's establishment entirely predates November 6, 2002 and therefore comes within the safe harbor of 11 C.F.R. § 300.2(c)(3). The evidence of NRCC funding of the Forum is of highly diminished importance because the Forum gave the money back before it did anything else. Other than giving the money back, requesting the putative AO, and responding to the complaint in this matter, the Forum does not appear to have done anything else.²⁴ Overall, therefore, a review of available and admissible information does not permit a conclusion that the Forum is established, financed, maintained, or controlled by the NRCC. Therefore, based on information currently available, this Office recommends that the Commission find no reason to believe that the Forum, Hirschmann or Paxon have violated 2 U.S.C. §§ 441i(a) or 434(e).²⁵

²⁴ The Forum did assert in its putative AOR of November 22, 2002 that it intended "in the near future" to engage in activities in which entities subject to 2 U.S.C. § 441i are prohibited from engaging. However, in the absence of the sort of disavowal of present intent that will be described below with respect to DSPO, virtually any "527" organization may all but be presumed to have such intent.

²⁵ If the Forum begins to undertake activities, then additional facts that are not apparent on the current record could lead to a different conclusion. Thus, in light of the apparent close and continuing ties that persons associated with the Forum have with the NRCC and House Republican leadership, the Forum would do well to ensure that it is thoroughly familiar with the definition of "directly or indirectly establish, maintain, finance, or control" at 11 C.F.R. § 300.2(c). Additionally, the Forum should be aware that if it were to qualify as a political committee pursuant to 2 U.S.C. § 431(4)(A), it would be obligated to register with the Commission and file regular reports of receipts and disbursements. See 2 U.S.C. §§ 433 and 434.

2. Receipt of the Returned \$1 Million by the NRCC

Section 441i(a)(1) prohibits any national party committee from receiving any funds not within the limitations and prohibitions of the Act on or after November 6, 2002. Furthermore, national party committees were required to have disbursed all of their non-Federal funds before January 1, 2003. 11 C.F.R. § 300.12(a). The Commission's regulations implementing BCRA contain a number of transition rules that govern the relationship between national party committees and non-Federal funds retained by them on November 6, 2002. In particular, between November 6 and December 31, 2002, a national party committee could use non-Federal money that had been received prior to November 6 for the following activities:

- (1) to pay outstanding non-Federal debts or obligations (or the non-Federal share of outstanding allocable debts or obligations) incurred in connection with an election that occurred prior to November 6;
- (2) to pay outstanding non-Federal debts or obligations (or the non-Federal share of outstanding allocable debts or obligations) incurred in connection with a runoff, recount, or election contest arising out of an election that occurred prior to November 6, 2002; or
- (3) to return the money by check to the original donors or disgorge the funds to the United States Treasury.

See 11 C.F.R. § 300.12(a) and (c). Funds remaining in a national party office building or facility account after November 6, however, could only be returned to the original donors or disgorged to the Treasury. See 11 C.F.R. § 300.12(d).

All of the aforementioned transition rules deal with the disposition of non-Federal money received by national party committees *prior to* November 6 and retained by them *on that date*. There are no exceptions to Section 441i(a)'s total bar on the *receipt* of non-Federal funds by national party committees on or after November 6, even if that receipt is a refund, as in the

NRCC's case. Therefore, this Office recommends the Commission find reason to believe that the NRCC violated 2 U.S.C. § 441i(a) when it accepted the Forum's return of the \$1 million.

Despite the apparent violation of 2 U.S.C. § 441i(a), the NRCC appears to have attempted to comply in good faith with at least the spirit of 11 C.F.R. § 300.12(d) by returning the \$1 million to building fund donors prior to the December 31 refund deadline. Moreover, the NRCC non-Federal building fund made no disbursements between December 24 and December 31 other than refunds to its donors. Therefore, given these mitigating circumstances, this Office further recommends that the Commission take no further action with respect to this violation other than sending a letter of admonishment.

IV. DSPO, ASDC, AND THE DNC

A. Facts

1. Organization and Personnel of DSPO

On August 14, 2002, DSPO incorporated as a District of Columbia nonprofit corporation. MUR 5338, Complaint, Exhibit F at 1. DSPO's response asserts that the incorporation was pursuant to a decision "made by the Democratic State Party chairs and vice chairs" at a meeting held in Las Vegas on August 10, 2002. MUR 5338, DSPO Response at 1.²⁶ DSPO's articles of incorporation provide that its

members shall consist of the state committee of the Democratic Party in each of the 50 states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands and American Samoa, and Democrats Abroad, each such committee to be represented in the corporation, for voting purposes, by the committee chair and the highest ranking officer of such committee of the opposite gender.

²⁶ According to the response, "an initial set of bylaws was considered, discussed and adopted informally at the meeting." *Id.* at 1-2. However, the response asserts, the DSPO's initial directors have not formally adopted the bylaws; therefore, according to the response, DSPO "at this juncture . . . has no actual corporate bylaws." *Id.* at 2. DSPO did not attach these initial, informally approved bylaws to its response.

MUR 5338, Complaint, Exhibit F at 3. They also state that DSPO is

organized to help build and strengthen state Democratic party organizations in the United States, to achieve the goals of building the Democratic Party at the grassroots level and for the acceptance of contributions and making of expenditures, within the meaning of section 527 of the Internal Revenue Code of 1986 as now in effect or as may hereafter be amended.

*Id.*²⁷

On November 29, 2002, DSPO registered with the Internal Revenue Service as a political

organization within the meaning of 26 U.S.C. § 527.²⁸ [http://eforms.irs.gov/](http://eforms.irs.gov/pac_list.asp?irs_pac_key=320039118)

[pac_list.asp?irs_pac_key=320039118](http://eforms.irs.gov/pac_list.asp?irs_pac_key=320039118). The address on its initial filing is its counsel's address.

DSPO has not registered with the Commission as a political committee. However, in the "purpose" section of its Form 8871, DSPO describes itself as a "Federal political committee established and affiliated with state Democratic Parties to assist state Democratic Parties." *Id.*

DSPO has not filed any Forms 8872 with the IRS disclosing donations or disbursements itemizable under 26 U.S.C. § 527(j). In its response to the complaint, DSPO asserts that the reason it has not yet registered with the Commission – and by implication, the reason it has not yet filed a Form 8872 with the IRS – is that

As of [January 9, 2003], DSPO has no bank account. It has not received a single penny of money. It has not spent a penny. Thus DSPO has no receipts. It has no disbursements. It has not conducted any activity or operations whatsoever. It has not incurred any obligation to make payment for anything.

²⁷ Section 527 of the Internal Revenue Code incorporates by reference the definitions of "contributions" and "expenditures" in 26 U.S.C. § 271(b)(2) and (3). These definitions are similar to those at 2 U.S.C. § 431(8)(A) and (9)(A), but without the Act's provision "for the purpose of influencing any election to Federal office," and without the extensive exceptions contained at 2 U.S.C. § 431(8)(B) and (9)(B). For purposes of clarity, unless a direct quotation is necessary this report refers to "contributions" within the meaning of 26 U.S.C. §§ 271 and 527 as "donations," and "expenditures" within the meaning of 26 U.S.C. §§ 271 and 527 as "disbursements" or "operating expenses."

²⁸ The IRS date-stamp reads November 29, 2002, though the form was apparently signed by Joseph Carmichael on November 13, 2002. Another "initial" Form 8871 was filed on January 6, 2003, which contained nearly identical information as the first.

MUR 5338, DSPO Response at 2 (citations omitted). This Office is aware of no publicly available information indicating that DSPO has engaged in any activity since January 9.

Joseph Carmichael, one of the incorporators and initial directors of DSPO, is listed as DSPO's president in its initial filing with the IRS. Carmichael currently serves as chair of the Missouri Democratic Party, president of the Association of State Democratic Chairs ("ASDC"), and, by virtue of the latter position, as an *ex officio* vice chair of the DNC. <http://www.democrats.org/about/bios/carmichael.html>; *Charter of the Democratic Party of the United States*, Art. III, § 1(e) (providing for president of ASDC to serve as *ex officio* vice chair of DNC) (PDF document viewed on DNC web site, February 12, 2003).

Also listed on the articles as an incorporator and initial director of DSPO, and listed on Form 8871 as DSPO's treasurer, is Molly Beth Malcolm, chairwoman of the Texas Democratic Party. <http://www.txdemocrats.org/index.asp?menu=party&page=stateOfficers>. Her biography on the Texas Democratic Party's web site identifies her as treasurer of ASDC. Finally, listed on DSPO's Form 8871 as custodian of its records is Ann Fishman. Since 1979 Fishman has been the treasurer of record for a number of political committees that are or have been affiliated with the ASDC.²⁹

2. DSPO and Non-Federal Funds

Media accounts attached to the complaint allege that DSPO was established primarily to solicit and receive non-Federal funds. The most extensive of the accounts is an article from the

²⁹ Also listed on the articles as an incorporator and initial director of DSPO, and listed on Form 8871 as DSPO's secretary, is Bonnie Watson Coleman, a member of the New Jersey Assembly and chairwoman of the New Jersey Democratic State Committee. <http://www.njleg.state.nj.us/Members/watson.asp>. Two other individuals are listed on Form 8871 as vice presidents of DSPO, although they are not incorporators or initial directors of the organization. They are Amy Burks, vice chair of the Alabama Democratic Party and Paul Berendt, chair of the Washington State Democratic Central Committee. <http://www.aladems.org/officers.asp>; <http://www.wa-democrats.org/contact.php>.

New York Times dated November 2, 2002 entitled "Parties Create Ways to Avoid Soft Money Ban." The article states in pertinent part:

At a meeting two weeks ago, the chairman of [the] Democratic National Committee, Terry McAuliffe, told a group of 40 of the party's most prolific fund-raisers that he expected a newly created spinoff organization, the Democratic State Party [sic] Organization, to raise approximately \$40 million in soft money before the 2004 presidential election, two party fund-raisers said.

* * *

At the Mayflower Hotel meeting on Oct. 15, party officials handed out a nine-page document on the goals of the [DSPO]. A copy of the document was obtained by the *New York Times*.

"This organization is being created in order to comply with the new campaign finance law," the document says. It goes on to say that the organization "would have the same legal status as a state party" and it "would not be legally affiliated with, controlled or financed by the Democratic National Committee."

MUR 5338, Complaint at Exhibit A. Another media report discusses the same or a similar meeting to acquaint Democratic donors with DSPO and quotes Joseph Carmichael as saying "the meeting 'was an opportunity for the state parties to make their pitch, which is what I did.'" MUR 5338, Complaint at Exhibit C. Finally, an August 25, 2002, article from the *Washington Post* reported that "[o]ne affiliate of the Democratic National Committee – the Association of State Democratic Chairs – has already taken formal steps to create a separate organization, the [DSPO], to raise contributions, including soft money, for get-out the vote and voter registration activities." MUR 5338, Complaint, Exhibit H at 3. The article quoted Carmichael as stating that "[w]e must chart a new path after campaign finance reform [w]ithout an organization such as DSPO, grass-roots activities and participation would be eradicated and replaced by television-only campaigns." *Id.*

The responses to the complaint deny the substance, although not the particulars, of these media accounts. DSPO asserts that "the Democratic state party chairs and vice chairs are still

discussing, with themselves and others, the types of new organizational structures that may be necessary or desirable to support the building of state and local parties in the post-BCRA environment . . . No final decisions have been made at this point." MUR 5338, DSPO Response at 2. It also asserts that "there has never been any plan or idea for DSPO to spend any of its funds for any 'Federal election activity.'" *Id.* For its part, the DNC points out that in the article itself "the DNC denied, on the record, that Chairman McAuliffe said any of the things attributed to him in the article by the anonymous source,"³⁰ and that "the meeting with donors at issue took place on October 15, 2002 – *before* the effective date of [BCRA]." MUR 5338, DNC Response at 1, 2 (emphasis in original).³¹

3. ASDC

ASDC is "an organization consisting of the chairs and vice-chairs of the state Democratic party committees of the 50 states, the District of Columbia and U.S. territories." Letter, Joseph Carmichael, Joseph E. Sandler and Neil P. Reiff to Rosemary C. Smith, May 29, 2002, submitting comments in response to the Commission's Notice of Proposed Rulemaking on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, (hereinafter, "ASDC

³⁰ According to the article:

A longtime Democratic fund-raiser who attended a secret party conclave at the Mayflower Hotel described Mr. McAuliffe's message as boiling down to "this campaign finance reform stuff is nothing but junk." The fund-raiser, who insisted on not being named, explained: "Terry said, 'This is the last time we'll be asking you for money – after November 5, we can't do it anymore. But get out there next year and in 2004 and continue to raise all this soft money.'"

Mr. McAuliffe did not return several phone calls seeking comment over the past several days. Maria Cardona, a spokeswoman for the Democratic National Committee, disputed that Mr. McAuliffe set a dollar goal. "No one ever remembers this goal that you are talking about," Ms. Cardona said. "Terry did not say it."

MUR 5338, Complaint at Exhibit A.

³¹ Additionally, a recent article in *The Hill* states that DSPO was separated from the DNC before the effective date of BCRA, though the article provides no details on how this separation occurred. <http://www.hillnews.com/news/031203/reform.aspx>.

Comments"), at 1. It "supports efforts to strengthen the role and capabilities of state Democratic party organizations through advocating their interests with the national party committees, before regulators and the Congress, and through training, workshops and other activities." *Id.*

The individuals who are members of ASDC – the chairs and vice chairs of the state Democratic parties – "automatically serve as members of the DNC." ASDC Comments at 3, citing Charter of the Democratic Party of the United States, Art. III, § 2(a).³² As of last May, when the comments were submitted, 13 of these individuals "serve[d] on the Executive Committee of the DNC, having been elected by their regional caucuses in accordance with the DNC bylaws or otherwise appointed to the Executive Committee." *Id.* All of these formal ties, in addition to the ASDC chair's *ex officio* position as a DNC vice chair, mean that "the state parties have an important role in the governance of" the DNC. *Id.*

ASDC has a political committee registered with the Commission under the name "Association of State Democratic Chairs Federal Operating Account" ("ASDC-Federal"). This committee originally registered with the Commission on September 16, 1991, checking the line indicating it was a party committee of the Democratic Party. In 2000, in response to a Request for Additional Information ("RAI") from the Commission's Reports Analysis Division inquiring about the relatively small amount of administrative expenses it reported, ASDC sent a letter to the Commission in which it stated that it "maintains only three full-time employees and utilizes office space currently occupied by" the DNC, which it specifically identified as an "affiliated national party committee."

³² In fact, the cited provision of the party charter describes this particular class of DNC members as "the Chairperson and the highest ranking officer of the opposite sex of each recognized state Democratic Party." Charter of the Democratic Party of the United States, Article III, § 2(a). Thus, it appears that in practice, the "chair and highest ranking member of the opposite sex" of a state Democratic party are equivalent to the chair and vice chair of the state party. This description is also virtually identical to the description in DSPO's corporate charter of the individuals who are to exercise voting rights on behalf of the DSPO's state party "members."

From its initial filing in 1991 through its 2002 Year-End report, ASDC-Federal listed the DNC's address as its address.³³ On its 2003 February Monthly Report, ASDC-Federal changed its address from that of the DNC to that of Ann Fishman's residence. Fishman, who is also DSPO's custodian of records, has been ASDC-Federal's treasurer of record since it registered with the Commission in 1991. Thus, while the recent filing indicates that ASDC-Federal may no longer be sharing office space with the DNC, it appears to have continued to do so well after November 6, 2002.

In general, most of ASDC-Federal's reported receipts over the years have consisted of transfers of "dues" received from state Democratic party committees or other fundraising representatives.³⁴ Most of its disbursements appear to have been for ordinary administrative expenses. It has on at least one occasion received a payment from the DNC that appears to have been a reimbursement of specific expenses incurred by ASDC-Federal on the DNC's behalf, but it has reported no transfers from DNC in the last five years. However, ASDC-Federal has apparently received other in-kind benefits from the DNC, such as rent and office supplies that it has not specifically reported as transfers received. It has on occasion reported transfers to the DNC as "transfers to an affiliated committee," but these have been comparatively rare and in relatively small amounts (i.e., well under \$20,000, and in some instances less than \$1,000).

³³ ASDC's existence as an organization within the Democratic Party and its sharing of office space with the DNC, appear to predate the Commission, much less any of the registered Federal political committees with which ASDC has been associated. One of the two DNC phone lines tapped by the "Watergate burglars" in 1972 was assigned to ASDC's then-executive director. *Wells v. Liddy*, 186 F.3d 505, 512 (4th Cir. 1999).

³⁴ ASDC has been the apparent connected organization of other committees that are or have been registered with the Commission; these committees either held themselves out as joint fundraising representatives or acted in important respects like joint fundraising representatives. These committees include ASDC/Democratic Victory Fund, Americans for Change/ASDC, and Dollars for Democrats. Dollars for Democrats, the most significant of these committees, originally registered with the Commission as a national committee of the Democratic Party. On November 1, 2002, the committee changed its address from that of the DNC to the law firm of Sandler, Reiff and Young, which is also the address listed for DSPO.

ASDC also has had, over the years, a non-Federal account or accounts. At times since 1991, ASDC has reported its non-Federal activity to the Commission as a national party committee would have done under the allocation regulations that existed prior to BCRA; at other times, it has not reported non-Federal activity to the Commission, as if its non-Federal accounts were analogous to those of a state party committee. It consistently reported non-Federal activity to the Commission between the 2000 June Quarterly Report and the 2002 Year-End Report. More consistently between 1991 and 2002, ASDC-Federal allocated administrative expenses between Federal and non-Federal funds; during that period, when it allocated expenses it always allocated them according to the fixed percentage ratio that was then applicable to national party committees, rather than the ballot composition ratio that was then applicable to state party committees.³⁵ ASDC-Federal's 2003 February Monthly Report, covering activity during January 2003, reported all expenses as made from entirely Federal funds.

B. Legal Analysis

1. Establishment, Financing, Maintenance and Control of DSPO

a. Relationship Between DSPO and ASDC

To determine whether a sponsor directly or indirectly controls an entity, the Commission examines a number of factors in the context of the overall relationship between the sponsor and the entity, including whether a sponsor has common or overlapping membership, officers, or employees with the entity that indicates a formal or ongoing relationship between the sponsor and the entity, 11 C.F.R. § 300.2(c)(2)(iv) and (v).

³⁵ In response to an RFAI, ASDC asserted not merely that it allocated its own allocable expenses using the national party committee ratio but that "any expenses that may be incurred by the DNC, including office rent and supplies, on behalf of ASDC are also paid for on the same federal/non-federal ratio."

Applying similar factors in the affiliation context, the Commission recently issued an advisory opinion that found two organizations affiliated where (1) 71% of the members of one organization were members of the second, (2) membership in the second was a prerequisite for holding office in the first, and (3) only one person currently served on the boards of directors of both organizations. Advisory Opinion 2002-15 at 9 and n.6 (approved February 13, 2003) (citing AO 1995-12, where "the Commission determined that a state association was affiliated with a related national association where 83 percent of the national members were members of the State association and 65 percent of the State association members were members of the national association").

In this case the membership of DSPO and ASDC appear not merely to overlap, but to be identical. While the state parties themselves are the nominal "members" of DSPO, their voting rights within the organization are to be exercised by the chair and the next-highest ranking officer of the opposite gender of each state party, who are also the "membership" of ASDC. Moreover, major officers of DSPO hold identical positions with ASDC. Carmichael, for example, is president of both organizations. Fishman, who is ASDC-Federal's treasurer of record and one of three paid ASDC staff members, is listed as DSPO's custodian of records and contact person. Additionally, Malcolm, DSPO's treasurer, holds herself out as having the same position with ASDC.

Under these circumstances, where the memberships of two organizations are identical, the purposes they serve are closely related, and there appears to be substantial overlap not merely in the identities of key officers and employees but in the offices they hold or roles they play in the organizations, there should be no doubt in the absence of any other evidence that the older

1 organization established, finances, maintains or controls the other. For all practical purposes,
2 ASDC and DSPO appear to be the same organization.

3 **b. Relationship Between ASDC and the DNC**

4 Since before the establishment of the Commission, the DNC has provided material
5 support to ASDC in the form of office space and supplies. This support appears to have
6 continued until at least January 2003, when ASDC-Federal changed its address. The relationship
7 between ASDC and the DNC is also evidenced by ASDC's response to an RFAI, in which
8 ASDC specifically stated that the DNC was an affiliated committee. An entity is a subordinate
9 committee of a national party committee if it is "affiliated with, and participates in, the official
10 party structure of the national committee." E&J at 49092. Subordinate committees are by
11 definition "established, financed, maintained or controlled" by the corresponding national party
12 committee." *Id.* at 49093.

13 The Democratic Party's highest governing document, its charter, specifically provides
14 that the president of the ASDC shall be a vice chair of the DNC. Charter of the Democratic
15 Party of the United States, Article III, § 1(e). All of ASDC's members are members of the DNC;
16 indeed, the class of persons eligible for membership in ASDC (and who exercise their state
17 party's voting rights in DSPO) is the same class of persons as the very first class of *ex officio*
18 DNC members provided for by the Democratic Party's charter. *Id.*, Article III, § 2(a). ASDC's
19 members comprise 112 of the 440 total members of the DNC. Thirteen of these ASDC members
20 also happen to be members of the DNC's Executive Committee, "which shall be responsible for
21 the conduct of the Democratic Party subject to this Charter, the National Convention, and the
22 [DNC]." *Id.*, Article IV, § 1.

23 In short, by its own admission, ASDC and its members "have an important role in" the
24 official party structure of the Democratic Party. ASDC Comments at 3. Accordingly, the

information available at this time leads to the conclusion that ASDC is "affiliated with, and participates in the official party structure of," the DNC. Consequently, by definition ASDC appears to be "established, financed, maintained or controlled" by the DNC.³⁶

c. Relationship Between DSPO and DNC

The remaining question is, if a subordinate committee of a national party committee, such as ASDC, itself establishes, finances, maintains or controls an entity, such as DSPO, do the non-Federal funds bar of 2 U.S.C. § 441i(a) and the reporting requirement of 2 U.S.C. § 434(e)(1) apply to the second-degree organization?

Section 441i(a)(2) applies to entities that are "*directly or indirectly*" established, financed, maintained or controlled by national party committees. In applying the phrase "or indirectly," it is important to keep in mind that the criteria at 11 C.F.R. § 300.2(c) are drawn from the criteria for determining whether two entities are affiliated. The original purpose of the Act's affiliation provision was anti-proliferation – that is, preventing the undermining of the Act's contribution limitations through the easy expedient of forming multiple, nearly identical political committees. The phrase "or indirectly" embodies, among other things, similar anti-proliferation principles. An organization that is itself subject to the bar on non-Federal funds by virtue of being a subordinate committee of a national party committee should not be able to evade the bar by the simple expedient of establishing an alter ego any more than its own parent

³⁶ Some of the evidence discussed in this section, such as the 2000 RFAI response and the information from ASDC's comments on the "Soft Money" rulemaking, predates November 6, 2002. However, ASDC has not amended ASDC-Federal's Statement of Organization, sought an Advisory Opinion, made a public statement, or apparently taken any other action to change or renounce this admission of affiliation. Additionally, this information differs in a fundamental way from the pre-November 6, 2002 information that could not be considered with respect to the Leadership Forum. The information about the Forum consisted of discrete acts, or comments describing discrete acts, which occurred prior to November 6. By contrast, the pre-November 6 information with respect to DSPO illuminates structural ties that continued beyond November 6, such as the provisions in the Democratic Party charter relative to the ASDC president and the state party chairs and vice chairs, and the apparent continued sharing of office space between ASDC and DNC until at least January 2003.

could. Therefore, because DSPO appears to be indirectly "established, financed, maintained or controlled" by the DNC, within the meaning of 2 U.S.C. § 441i(a)(2), DSPO is thus subject to the non-Federal funds bar of 2 U.S.C. § 441i(a) and the reporting requirements of 2 U.S.C. § 434(e).

2. Consequences of Establishment, Financing, Maintenance or Control

a. Non-Federal Funds

The media accounts at Exhibits A, C and H to the complaint state explicitly that DSPO was established to be an organization that could accept non-Federal funds. In particular, the *New York Times* article at Exhibit A asserts that the Times obtained a document distributed on October 15 to persons who had previously donated to the DNC non-Federal accounts in which DSPO was described as a vehicle for continuing to raise and spend non-Federal money after BCRA's effective date.

By contrast, DSPO's response, dated January 9, asserts that DSPO has from its founding been, in practical terms, nothing more than a paper shell. It states that at least as of January 9, DSPO had yet to raise or spend its first penny of any type of funds, Federal or non-Federal. It also represents that as of that date no final decisions had been made concerning what kind of money DSPO would raise, what activities it would engage in, or whether it would ever be activated at all. This Office has found nothing in the public record that contradicts DSPO's explicit representations that notwithstanding the pre-November 6 statements attributed to Mr. McAuliffe, it has yet to decide whether it will engage in activities that BCRA would prohibit if it were found to be subject to 2 U.S.C. § 441i. Additionally, this pending enforcement matter put DSPO on notice that raising funds may violate the Act. Viewed in light of all these circumstances, there is no indication that DSPO is about to violate 2 U.S.C. § 441i(a).

Therefore, this Office recommends that the Commission find no reason to believe that DSPO, the

DNC, Carmichael or McAuliffe have violated 2 U.S.C. § 441i(a) in connection with this matter.³⁷

b. Reporting

For similar reasons, this Office recommends that the Commission find no reason to believe that DSPO has violated 2 U.S.C. § 434(e)(1). DSPO has had no receipts or disbursements to report, and does not appear to be about to do so. DSPO's articles of incorporation state that it intends to operate as a Federal political committee, and the DSPO or DNC document obtained by the *New York Times* also purportedly stated that the DSPO would have the same "legal status" as a state party. Thus, DSPO may have intended to eventually comply with the reporting requirements of 2 U.S.C. § 434(e)(2). However, for the reasons described above, DSPO appears to be indirectly established, financed, maintained or controlled by the DNC; therefore, when and if it becomes required to register and report, it will be subject to Section 434(e)(1), not Section 434(e)(2).

V. RECOMMENDATIONS

1. Find no reason to believe that the Leadership Forum, Susan Hirschmann, or L. William Paxon have violated 2 U.S.C. §§ 441i(a) or 434(e).
- 2.
3. Find no reason to believe that the Democratic State Parties Organization has violated 2 U.S.C. §§ 441i(a) or 434(e).

³⁷ Should the Commission adopt this recommendation and this report's reasoning supporting it, neither DSPO, the DNC, nor anyone else should make any mistake about the meaning of the finding. For the reasons described in this report, there is presently enough information to conclude that DSPO is directly established, financed, maintained or controlled by ASDC and is therefore indirectly established, financed, maintained or controlled by the DNC. Accordingly, before DSPO accepts any non-Federal funds, it would be well advised to obtain an advisory opinion permitting it to do so and to present, in a request for such an opinion, evidence that either its relationship with ASDC or ASDC's relationship with the DNC has changed from that described in this report. See 11 C.F.R. § 300.2(c)(4).

4. Find no reason to believe that the DNC Services Corp./Democratic National Committee and Andrew Tobias, as treasurer; Joseph Carmichael or Terry McAuliffe have violated 2 U.S.C. § 441i(a).
5. Approve the appropriate letters.
6. Close the file.

3/27/03
Date

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Attachment:

1. November 21, 2002 letter from the Leadership Forum requesting advisory opinion

4-801-904-404-1084